No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a monocular individual is "disabled" per se, under the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12112(a) (1994).

2. Whether a monocular driver of a commercial motor vehicle, who failed to meet the minimum Department of Transportation's vision requirements, is a "qualified" individual under the ADA.

3. Whether an employer must adopt an experimental vision waiver program as a means of "reasonable accommodation."

List of Parties

The parties before the Court, and the parties to the proceeding below are identical.

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Rule 29.1 Listing

Albertsons has no parent companies nor nonwholly owned subsidiaries to list.

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OCTOBER TERM, 1998

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Albertsons, Inc. respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-33a) is reported at 143 F.3d 1228 (1998). By order entered July 8, 1998, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc (App., *infra*, 34a). The opinions of the district court (App., *infra*, 35a-45a) are unreported.

JURISDICTION

On May 11, 1998, the United States Court of Appeals for the Ninth Circuit entered its order and opinion in this case. On July 1, 1998, the United States Court of Appeals for the Ninth Circuit entered its order and amended opinion in

this case. The United States Court of Appeals for the Ninth Circuit entered its order denying the petition for rehearing of Albertsons, Inc., and the suggestion for rehearing en banc on July 8, 1998, The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes involved are as follows:

42 U.S.C. §12112(a)

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12111(8)

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For purposes of this subchapter,

consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

29 CFR §1630.2(m)

(m) Qualified individual with a disability

means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See section 1630.3 for exceptions to this definition).

42 U.S.C. §12102(2)

(2) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

29 CFR §1630.2(i)

(i) Major Life Activities

means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 CFR §1630.2(n)

(n) Essential functions. -

(1) In general. The term "essential function" means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;
(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
(iii) The function may be highly specialized so that the incumbent in the position is

hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;
(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;
(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs.

29 CFR §1630.2(j)

(j) Substantially Limits

(1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or
(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a

major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of "working" --

(i) The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single,.particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in

paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number of types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

<u>42 U.S.C §12113(a),(b)</u>

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or

tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. §12111(3)

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

49 CFR §391.41(b)(10)

(b) A person is qualified to drive a commercial motor vehicle if that person--

(10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant

binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

STATEMENT OF THE CASE

Facts

Albertsons hired plaintiff as a truck driver at the Portland, Oregon Distribution Center on August 21, 1990. On December 3, 1991, plaintiff fell from a truck while on the job and injured his head, hand, and shoulder. Plaintiff was off work due to the injury until he was released to return to work in November of 1992.

All over the road truck drivers are required by the federal government to be certified as medically competent to drive. 49 CFR §391.41(a). While plaintiff was an employee of Albertsons, he was erroneously certified twice by two different medical examiners. In regard to vision standards, Department of Transportation (hereafter "DOT") regulations require a minimum acuity score of 20/40 corrected in each eye. 49 CFR §391.41(b)(10).

Although plaintiff's medical examination on August 18, 1990 revealed plaintiff had acuity ratings of 20/25 vision in the right eye and 20/70 (a failing grade) in the left eye, the medical examiner incorrectly certified that plaintiff met the requirements under the Motor Carrier Safety Regulations, 49 CFR §391.41-391.49. Plaintiff's medical examination form of February 5, 1991, showed plaintiff had acuity ratings of

20/25 vision in the right eye and 20/100 (a failing grade) in the left eye, yet, once again, a medical examiner certified that plaintiff met the requirements under the Motor Carrier Safety Regulations.

Plaintiff testified that his vision in his left eye has always been 20/200 and that it has not changed. Albertsons historically has deferred to the medical certifications of its examining physicians, as evidenced by their completion of the DOT certification cards.

Albertsons' company policy requires that all drivers are recertified (DOT certification) when they return from a long- term injury. Thus, when plaintiff returned from his nearly one year medical absence, Albertsons asked him to recertify with a physical examination from the Eubanks clinic on November 6, 1992. Dr. Douglas Eubanks, D.O., examined plaintiff and correctly found his acuity rating to be 20/20, corrected, in the right eye and 20/200, corrected, (a failing grade) in the left eye. Dr. Eubanks found that plaintiff failed to meet the minimum vision requirements under DOT standards and so advised Albertsons' Transportation Department on November 6, 1992.

At all times, plaintiff insisted on returning to work as a driver. Albertsons' consistent policy has been only to employ drivers who meet or exceed the minimum DOT standards. Albertsons has never accepted DOT waivers.

While Albertsons did not believe plaintiff was otherwise qualified to drive a commercial vehicle, it did consider plaintiff for and offered to plaintiff other jobs. After terminating plaintiff's employment, Albertsons offered plaintiff the positions of Yard Hostler (moving trailers at the Distribution Center) and Tire Man. When Albertsons realized that the Yard Hostler position also required DOT certification, the Company withdrew the offer before it was accepted. Plaintiff refused the Tire Man position because of

the pay cut he would have to take. General Manager of the Distribution Center, Frank Riddle, and Corporate Labor Relations personnel decided to terminate plaintiff from his job as a commercial truck driver. Mr. Riddle reviewed plaintiff's DOT file before terminating him. Plaintiff's DOT file showed he did not meet the DOT minimum requirements of the DOT manual. Additionally, Albertsons' Driver Manual states, "As an Albertson's driver, you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." Under these standards, Plaintiff should never have been allowed to drive for Albertsons at all.

Frank Riddle directed Theodore Sturgill, the Transportation Manager, to terminate Plaintiff's employment because he did not meet the minimum DOT requirements. Mr. Sturgill, and Personnel Manager Charles Norris terminated plaintiff's employment with the Company on November 20, 1992 for failing the DOT physical. Plaintiff obtained a vision waiver from the DOT[1] on February 2, 1993. Albertsons did not reconsider plaintiff's termination after he notified them that he had received the vision waiver. Employers have never been required to accept vision waivers. Further, Albertsons has never accepted waivers from DOT minimum requirements because of concern for the safety of its drivers and that of the general public.

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[1] The experimental vision-waiver program was invalidated August 2, 1994. *Advocates for Highway Safety v. Federal Highway Administration*, 28 F.3d 1288, 1294 (D.C. Cir. 1994). The court found the Federal Highway Administration (FHWA) adopted the waiver program contrary to law. *Id.* The FHWA failed to determine that a waiver was consistent with the safe operation of commercial motor vehicles. *Id.*

Proceeding Below

Plaintiff filed a complaint in the United States District Court for the District of Oregon alleging that Albertsons violated the ADA by failing to accommodate him by: 1) not waiting a reasonable time to allow plaintiff to obtain a vision waiver; 2) not allowing plaintiff to return to work once he received the vision waiver; and 3) not reassigning him to other suitable work. The jurisdiction of the district court was invoked under the ADA, 29 U.S.C. §12110, et. seq., and under 28 U.S.C. §1331 (general federal question jurisdiction).

Albertsons filed for summary judgment on the ground that: 1) Plaintiff was not a qualified individual, with or without accommodation, under the ADA because he could not meet the DOT vision standards, which was an essential function of his job.

The district court granted Albertsons' Motion for Summary Judgment, holding that: 1) Kirkingburg was not a qualified individual under the ADA because he could not perform the essential functions of the job; 2) Requiring Albertsons to grant Kirkingburg a leave of absence to obtain a vision waiver was not a reasonable accommodation, as such accommodation would be futile; 3) The ADA does not obligate Albertsons to employ truck drivers who have received vision waivers; and 4) Albertsons may rely on the DOT vision standards and need not make an individual assessment of plaintiff's ability to drive.

Plaintiff filed a Motion for Reconsideration with the district court on the ground that the court did not address whether one form of reasonable accommodation would have been to reassign plaintiff to a yard hostler position (or to another available and suitable position). The district court denied plaintiff's Motion for Reconsideration, stating that plaintiff failed to provide evidence that the yard hostler

position was available when he was terminated and that since driving was an essential part of that position, such accommodation would be futile.

Kirkingburg appealed to the United States Court of Appeals for the Ninth Circuit. In a decision by Circuit Judge Reinhardt, the Ninth Circuit reversed the district court's decision and remanded the case for trial. The Ninth Circuit held: 1) Kirkingburg was disabled under the ADA and its implementing regulations, if the facts were as he alleged; 2) There was a genuine issue of material fact regarding whether Albertsons perceived Kirkingburg as disabled; 3) Kirkingburg was a qualified individual under the ADA, because he established a genuine issue of material fact with respect to whether he could perform the essential functions of a commercial truck driver; 4) By refusing to accept the FHWA waiver, Albertsons chose to adhere to only a portion of the federal regulations; 5) Albertsons was not free to disregard the waiver program for the reason it asserted at the time of Kirkingburg's termination, because there was no evidence that Albertsons believed the waiver program to be invalid; 6) Albertsons failed to produce any evidence that Kirkingburg and other waiver recipients posed a direct safety threat.

Circuit Judge Rymer filed a dissent, which stated that: 1) Kirkingburg failed to show that he could perform the essential functions of his job because he did not meet the DOT visual requirements; 2) The ADA does not require Albertsons to accept an experimental waiver that the FHWA (at the time of plaintiff's termination) had not found consistent with the safe operation of commercial motor vehicles; and 3) Since Albertsons offered to accommodate Kirkingburg's disability by another job (which Kirkingburg rejected) it fulfilled its ADA obligations.

Albertsons filed a Petition for Rehearing and

Suggestion for Rehearing En Banc, which was denied on July 8, 1998.

REASONS FOR GRANTING THE PETITION

As the Ninth Circuit acknowledged (App., *infra*, 15a, fn.4), its holding that a monocular driver is "disabled" per se under the ADA conflicts with *Still v. Freeport-McMoran, Inc.* 120 F.3d 50 (5th Cir. 1991). This issue is one which has resulted in conflicts in other circuits, as well, and the need for guidance of the Court is significant. Although another appellate court has recently asked the Court to review this issue (*Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. den.*, 118 S.Ct. 693 (Jan. 12, 1998)), this issue is timely and proper, as the instant case provides a much less fact-bound vehicle for review.

Further, the decision below is erroneous, and the issues that it addresses are of national significance and exceptional importance and directly affect the safety of the general public. The Ninth Circuit's opinion overlooks long-standing, well-established Federal Regulations in favor of an experimental program that was (and is) not an official part of federal law. The decision contravenes the vision requirements of the Federal Regulations that have been unchanged since 1970. If allowed to stand, the decision below will lead to much confusion over the parameters of what is considered "federal law." Additionally, this decision will *force* employers to hire and maintain a workforce that could potentially pose a safety hazard to themselves and the general public.

I. The Court of Appeals' Interpretation of 42 U.S.C. §12102(2) Conflicts with the Interpretation of the Fifth Circuit, and Aggravates the Existing Split in the Circuit Courts.

The decision below held that plaintiff has presented a genuine issue of material fact regarding whether or not he was "disabled" under the meaning of the ADA, relying, in part, on evidence that was not in the record. The ADA provides coverage for a "qualified individual with a disability." 42 U.S.C § 12112(a) (1994). The ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment;
> (C) or being regarded as having such an impairment. 42 U.S.C. § 12102(2). (emphasis added).

The Ninth Circuit next looked to the implementing regulations to assist in defining "disability" and appeared to rely heavily on the language that states (in relevant part) that "an impairment is substantially limiting if it 'significantly restricts as to the ... *manner* ... under which an individual can perform a major life activity ... as compared to the ... *manner* under which the average person in the general population can perform that same major life activity.'" (App., *infra*, 14a, *citing*, 29 C.F.R. § 1630.2(j)(1)(ii) (1993)).

After stating that "Kirkingburg is substantially limited in the major life activity of seeing," the Ninth Circuit goes on to explain that Kirkingburg's "brain has developed

subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner*, in which he sees differs significantly from the *manner* in which most people see." (App., *infra*, 14a) (emphasis original). However, significantly, this information, upon which the court relies for the determination that plaintiff is "disabled," is simply not in the record. The Ninth Circuit should not be allowed to issue a decision on facts that are not before it.

Further the Ninth Circuit, in determining that plaintiff's monocular vision was a "disability" under the ADA, relied on an Eighth Circuit opinion, *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997). *Doane* held that a monocular-visioned person was "disabled" because "the *manner* in which he performed the major life activity of seeing was different." (App., *infra*, 15a, *citing*, *Doane* at 627). However, the court, in a footnote, cited to a Fifth Circuit decision that directly contradicted the *Doane* case by holding "as a matter of law, that a monocular-visioned individual was not disabled because he was 'able to perform normal daily activities.'" (App., *infra*, 15a, fn.4 (emphasis added), *citing*, *Still v. Freeport-McMoran, Inc.*, 120 F. 3d 50, 52 (5th Cir. 1997)). Until the Ninth Circuit's decision in the instant case, it had not decided this issue. The need for uniformity within the circuits is strongly needed, as the determination of an whether an individual is "disabled" is the cornerstone of an ADA claim. This issue needs to be resolved.

II. The Decision of the Court of Appeals is Erroneous.

The decision below held that Albertsons had a duty to accept plaintiff's FHWA vision waiver, stating that Albertsons "has chosen to adhere to only a part of the [DOT]

regulations, while ignoring the waiver program" (App., *infra*, 19a). The opinion further states that Albertsons "cannot selectively adopt and reject federal safety regulations" (App., *infra*, 27a). This statement in not only patently incorrect, but, it is inherently a dangerous one.

The vision waiver program was not a part of the regulations in 1992, when Albertsons made the decision to adhere to the regulations, nor has it ever been a part of the regulations. To the contrary, "[t]he vision study waiver program was a part of the FHWA's 'efforts to review, and eventually amend its vision requirements through a rulemaking action'" (App., *infra*, 30a, *citing*, 57 Fed. Reg. 31,458 (1992)). The agency, itself, defined the vision waiver program as a "study" to provide it with necessary "empirical data." Id. It was not an official rule or regulation, it was solely an experiment. Significantly, this experiment has never been found to be successful enough to warrant amending the actual regulations. The court's holding that the FHWA vision waiver program is a part of the DOT Regulations is in error, and should not be allowed to stand, as it lends itself to confusion regarding the definition of "federal law."

The vision requirements in effect in November 1992 (when Kirkingburg was examined by the physician who informed Albertsons that Kirkingburg did not meet the minimum standards) had been unchanged since 1970 (and are, at the present time, still unchanged).

The minimum vision requirements established by DOT for operators of commercial motor vehicles require:

> "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at

least 20/40 (Snellen) in both eyes with or without corrective lenses ***." 49 C.F.R §391.41(b)(10).

Forcing Albertsons and other employers to accept a vision waiver would be contradictory to the long-established, and only official, DOT vision requirements. The effect on employers of drivers of commercial motor vehicles could lead to employers being forced to ignore the established federal regulations.

III. The Questions Presented are Important

In order for employees to enjoy the protection of the ADA, they must not only demonstrate that they meet the definition of "disabled" but must also establish that they are "qualified individuals" under the statute. *See*, *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990). The factors considered in determining whether an individual is "qualified" are: 1) whether a person satisfies the requisite skill, experience, education and other job-related requirements of the employment position, and 2) whether with or without reasonable accommodation the individual can perform the essential functions of the position. *See*, 29 C.F.R. § 1630.2(m).

The Ninth Circuit held that plaintiff had established a genuine issue of material fact with respect to his status as a "qualified" individual. Although Albertsons contended that Kirkingburg failed to meet the "essential function" prong of the "qualified individual" test by the fact that he did not meet the minimum requirements of the DOT, the court addressed this issue incorrectly under the "job-related requirement." The correct analysis should have been under both prongs.

"Essential functions" are defined by the regulations as "the fundamental job duties of the employment position." 29

C.F.R. § 1630.2(n). In order to work as a commercial driver for Albertsons, an individual must meet or exceed the standards set out in the DOT Regulations. Albertsons does not allow drivers to drive its commercial vehicles without meeting or exceeding the standards set out in the DOT Regulations. Kirkingburg did not meet the minimum DOT standards, thus, he could not drive commercial vehicles for Albertsons. Driving is a "fundamental job duty" of Albertsons' position of commercial truck driver. Contrary to the Ninth Circuit's holding, because he did not meet the DOT minimum standards, Kirkingburg could not perform the essential function of a commercial truck driver for Albertsons.

Second, the Ninth Circuit did not ultimately address whether Kirkingburg met the "job-related requirement." Rather, the court attacked the legality of Albertsons' enforcement of the job-related requirement that commercial vehicle drivers meet the minimum standards of the DOT Safety Regulations "as applied" (App., *infra*, 18a). The court, again, relies on its misplaced understanding of the FHWA's vision waiver program and that program's relationship with the Federal Regulations. As stated above, the waiver program of the FHWA was never a part of the Federal Regulations, rather it was an experimental program. The Court is strongly urged to define and establish the existing relationship between the waiver program and the Federal Regulations.

Additionally, the Ninth Circuit disputes Albertsons' argument that it was concerned with the safety of the vision waiver program. The court does not provide any support for its assertion that Albertsons' decision not to accept vision-waivers was not based on safety. The only support cited by the court is a 1994 FHWA Notice, 59 Fed. Reg. 59,386, 59,389, which announced that the waiver program "has been

adjudged a success by the FHWA" (App., *infra*, 20a). Thus, the court relies on a Notice that was issued two years after Mr. Kirkingburg left the employment of Albertsons. It is clearly not a Notice of which Albertsons would have, or even could have, been aware in deciding the safety issues involved in accepting a vision waiver (Although, that decision never had to be made, as Kirkingburg did not have a valid waiver at the time of his termination.).[3] All that Albertsons was aware of at the time of plaintiff's termination was the fact that the vision waiver program was "experimental" and not a part of the Federal Regulations. Thus, it is reasonable to conclude that Albertsons would be rightfully concerned with the safety issue of accepting a vision waiver.

Accordingly, because of the overriding public safety issues involved, coupled with the need for uniformity among the circuits regarding the definition of a disability under the ADA, and the erroneous nature of the Ninth Circuit's decision, Petitioner urges this Court to grant the petition for review.

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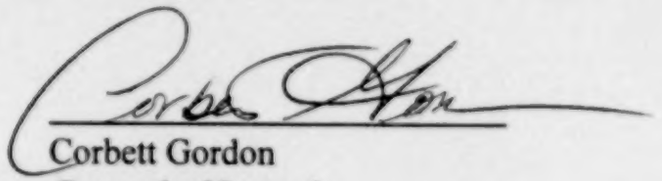
[3] Significantly, Kirkingburg did not have a vision-waiver at the time of his termination. He did not receive a vision-waiver until 3 months after his termination. Therefore, even if Albertsons had to apply both the DOT Regulations and the FHWA's vision-waiver, and not pick and choose which to follow (as the Ninth Circuit held), plaintiff still wou'd not escape his termination. At the time of his termination, Kirkingburg had not satisfied either the DOT vision requirements contained in the Federal Regulations, or the requirements of the FHWA vision waiver. The facts at issue here are inconsistent with the result reached by the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for a writ of certiorari, reverse the Ninth Circuit, and affirm the district court's decision.

Respectfully Submitted,



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HALLIE KIRKINGBURG,	)	No. 96-35002
Plaintiff-Appellant,	)	D.C. No.
	)	CV-95-549-PA
v.	)	
	)	ORDER AND
ALBERTSONS, INC.,	)	AMENDED
	)	OPINION
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted
July 8, 1997--Portland, Oregon

Filed May 11, 1998
Amended July 1, 1998

Before: Alfred T. Goodwin, Stephen Reinhardt, and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Rymer

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals reversed a judgment of the district court. The court held that under the Americans with Disabilities Act (ADA), a private employer may not impose Department of Transportation (DOT) visual acuity regulations on a truck driver who has received a waiver of the vision requirements from the Federal Highway Administration (FHWA).

Appellant Hallie Kirkingburg was a commercial truck driver with almost 20 years experience and an impeccable driving record. In 1990, appellee Albertson's, Inc. hired Kirkingburg as a driver. A physician certified that his vision met the requirements of DOT regulations. Kirkingburg performed well on a 16-mile road test, and earned an evaluation of "superior driving skill" from an Albertson's transportation manager.

Kirkingburg had poor visual acuity (20/200) in his left eye, and was deemed monocular, due to an uncorrectable condition. His left-eye acuity rating was below DOT general regulations, but the rating of his right eye was 20/20 with corrective lenses.

After Kirkingburg was on the job for over a year, he suffered a non-driving injury and did not return to work for almost a year. When he returned, Kirkingburg had to be recertified. This time, the examining physician determined

that his left-eye acuity was 20/200 and refused to certify him.

Kirkingburg applied for a waiver of the DOT vision requirements under the FHWA's vision waiver program, which was instituted to bring DOT standards into compliance with the ADA. To obtain the waiver, Kirkingburg had to show that he was a commercial driver, could drive well despite his monocular vision, and had a good driving record. Kirkingburg informed Albertson's that he had applied for the waiver. Albertson's fired him on the ground that all its drivers had to meet or exceed DOT standards.

Kirkingburg obtained the FHWA waiver, but Albertson's refused to reconsider his discharge.

Kirkingburg sued Albertson's under the ADA. Albertson's contended that he was not entitled to relief under the ADA because he was not "disabled" within the meaning of the statute, and if he was, he was not "otherwise qualified" for the position of truck driver. With respect to its job-related requirements, Albertson's asserted that federal law mandated that its drivers meet the regular DOT vision requirements, that it had the right to adopt the regular DOT standards as its own, and that its refusal to accept FHWA waivers was justified because drivers who do not meet the basic standards pose a direct threat to safety.

The district court granted summary judgment for Albertson's, concluding that Kirkingburg failed to establish a prima facie case under the ADA. Kirkingburg appealed.

[1] To survive a motion for summary judgment, Kirkingburg had to demonstrate a genuine issue of material fact regarding whether he was a disabled person within the

meaning of the ADA; whether he was otherwise qualified for the position, that is, whether he was able to perform the essential functions of his job, with or without reasonable accommodation; and whether the employer terminated him because of his disability.

[2] The ADA states that a "disability" is a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment. Under implementing regulations, an impairment is substantially limiting if it significantly restricts as to the condition, *manner*, or duration under which an individual can perform a particular major life activity, as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity. Major life activities include seeing.

[3] Kirkingburg presented uncontroverted evidence that he suffered from a condition resulting in his being almost totally blind in his left eye. There was no question that Kirkingburg was substantially limited in the major life activity of seeing. Although his body compensated for his disability, the *manner* in which he saw differed significantly from the *manner* in which most people see. Kirkingburg saw using only one eye; most people see using two. Under the statute and implementing regulations, Kirkingburg was therefore disabled, if the facts were as he alleged.

[4] Albertson's contention that Kirkingburg was not disabled because he was not totally blind was inconsistent with the expansive goals of the ADA, which was drafted in broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination.

[5] An expansive reading of the statutory definition of "disability" does not leave employers unduly exposed to liability. The ADA does not require employers to hire or retain any person who is not capable of doing his job properly. It merely prohibits employers from discriminating against qualified workers on account of their disabilities.

[6] There existed a genuine issue of material fact regarding whether Albertson's perceived Kirkingburg as disabled. Even if Kirkingburg were not disabled, his employer's perception of him as having a disability would have been sufficient to bring him under the coverage of the ADA. Because Kirkingburg presented evidence that one of the Albertson's managers described him as "blind in one eye or legally blind," he established a genuine issue as to whether his employer believed that he was disabled.

[7] Under the ADA, Kirkingburg had to show that he was a "qualified individual." In this regard, Kirkingburg had to establish that he satisfied the requisite skill, experience, education, and other job-related requirements of the employment position that he held, and that with or without reasonable accommodation, he could perform the essential functions of his position.

[8] Kirkingburg established a genuine issue of material fact with respect to whether he could perform the essential functions of a commercial truck driver. There was no question that Kirkingburg's experience, and in particular his year of experience as a driver for Albertson's, was evidence from which a reasonable factfinder could have concluded that Kirkingburg was able to perform the essential functions of the job. More pertinent was the fact that Kirkingburg received a FHWA waiver based in part on his

excellent driving record.

[9] The dispositive question was whether Albertson's job-related requirement that Kirkingburg failed to meet was lawful as applied. Albertson's maintained that Kirkingburg could not show that he was qualified because he could not fulfill its requirement of meeting or exceeding the regular DOT vision standards.

[10] Because the FHWA waiver program is part of federal law, and recognizing FHWA waivers is consistent with federal law, Albertson's could not justify its adoption of the regular DOT vision standards as a job-related requirement by asserting that federal law requires its drivers to meet those standards regardless of whether they are qualified for and obtain FHWA waivers. Albertson's did not simply conform its job requirements to the DOT regulations; it chose to adhere to only a part of the regulations, while ignoring the waiver program.

[11] By refusing to accept the FHWA waivers, Albertson's rejected a portion of the federal scheme that was designed to eliminate the discriminatory effects of DOT safety regulations and bring them into compliance with the ADA.

[12] Albertson's was not free to disregard the waiver program for the reasons it asserted at the time it fired Kirkingburg. Because there was no evidence that Albertson's believed the waiver program to be invalid, or that it relied on any such belief as a basis for its refusal to accept the FHWA waiver, it was unnecessary to decide whether such a belief would have shielded it from liability.

[13] Albertson's failed to produce any evidence that Kirkingburg and other waiver recipients posed a direct safety threat. Under the statute, a direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. A "significant risk" means a high probability of harm that is neither remote nor speculative. Drivers who qualify for the waiver program have established that they do not pose a safety threat. Denying a monocular-visioned driver the opportunity to work, in spite of his having demonstrated that he is capable of performing the job safely, is precisely the sort of discrimination that the ADA sought to abolish.

[14] The waiver program was designed to bring the DOT regulations into compliance with the requirements of the ADA, and serves to protect disabled persons against unfounded discrimination. Individuals who secure waivers have been determined to be safe drivers. However one views the other parts of the DOT regulations, the waiver program does not provide a floor for employers; rather it precludes them from declaring that persons determined by FHWA to be capable of performing the job of commercial truck driver are incapable of performing it by virtue of their disability.

Judge Rymer dissented, taking the position that under the ADA, complying with current DOT safety requirements was an essential function of Kirkingburg's job.

COUNSEL

Scott N. Hunt, Portland, Oregon, for the plaintiff-appellant.

Corbett Gordon, Portland, Oregon, for the defendant-appellee.

ORDER

The opinion in this case is amended as follows:

At Slip op. 4623, the first full paragraph, reading "Under the ADA, an employer is prohibited ....", is DELETED.

OPINION

REINHARDT, Circuit Judge:

Hallie Kirkingburg, a monocular-visioned truck driver, filed an action in district court alleging that his employer, Albertson's, Inc. discriminated against him on account of his visual disability in violation of the Americans with Disabilities Act ("ADA" or "the Act"). 42 U.S.C. § 12112(a) (1994). Albertson's moved for summary judgment, arguing that Kirkingburg had not established a prima facie case under the ADA. The district court agreed with Albertson's and granted summary judgment in its favor. Kirkingburg appeals. We hold that the granting of summary

judgment to Albertson's was erroneous.

The Facts

Since 1979, Hallie Kirkingburg has been driving commercial trucks. His driving record is impeccable -- he has been in only one accident, which was determined to be not his fault, and he has received no citations for moving violations. In 1990, Albertson's hired Kirkingburg as a driver at its distribution center in Portland, Oregon. Prior to starting work for Albertson's, Kirkingburg was examined by a physician who certified that his vision met the requirements established under Department of Transportation ("DOT") regulations.[1] Kirkingburg also performed well on a 16-mile road test that Albertson's administered before it offered him the job. Following the road test, Albertson's transportation manager stated that "It is my considered opinion that [t]his driver possesses superior driving skill to operate safely the type of commercial vehicles listed above." Several months into the job, Kirkingburg was again examined by a physician and his vision was recertified.[2] Notwithstanding these medical certifications, the visual acuity of Kirkingburg's left

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1 According to the DOT regulations, operators of commercial motor vehicles should have a "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) with or without corrective lenses." 49 C.F.R. § 391.41(b)(10).

2 Both medical examinations revealed that Kirkingburg's vision did not meet the applicable standards; neither examination, however, correctly appraised Kirkingburg's actual visual acuity. It is not clear why Kirkingburg received a certification on these two occasions in spite of his failure to meet the required standards.

eye is, and has been since birth, rated 20/200, well below what the general DOT regulations require. The poor vision in his left eye is caused by amblyopia, a condition commonly referred to as "lazy eye," which cannot be corrected. His right eye, however, has a visual acuity rating of 20/20 (with corrective lenses). In short, Kirkingburg's vision is monocular.

In late 1991, after he had been on the job for over a year, Kirkingburg suffered a nondriving, work-related injury when he fell from a truck. As a result of the accident, he did not return to work for almost a year. Albertson's policies require employees who are resuming work after a long-term absence to secure recertification under the DOT standards, and in November 1992, Kirkingburg's vision was again examined. This time, the examining physician correctly determined that the vision in Kirkingburg's left eye was 20/200. Accordingly, the doctor refused to certify him under the DOT regulations and informed Albertson's of these findings.

When Kirkingburg was denied DOT certification, he applied for a waiver of the regular vision requirements under the Federal Highway Administration's ("FHWA") vision waiver program, which was instituted in order to bring DOT's standards into compliance with the ADA without sacrificing highway safety. The establishment of this program fulfilled Congress's expectation that DOT would revise its safety regulations in order to end unfounded discrimination against drivers with visual disabilities. *See generally Rauenhorst v. United States Dep't of Transp., Fed. Highway Admin.*, 95 F.3d 715 (8th Cir. 1996) (detailing the history of the FHWA vision waiver program). Under the program, FHWA makes vision waivers available to certain

experienced commercial truck drivers who have clean driving records.

In order to obtain a vision waiver under the FHWA program, the applicant, among other things, is required to establish that he has three years of recent experience driving a commercial vehicle without (1) license suspension or revocation, (2) involvement in a reportable accident in which the applicant received a citation for a moving violation, and (3) more than two convictions for any other moving violation in a commercial vehicle. 57 Fed. Reg. 31,458 (1992). In addition, the applicant is required to present proof from an optometrist certifying that his visual deficiency has not worsened since his last examination, that the vision in one eye at least is correctable to 20/40, and that he is "able to perform the driving tasks required to operate a commercial motor vehicle." *Id.* at 31,460. In other words, DOT will waive its regular vision requirements for commercial vehicle drivers, such as Kirkingburg, who have monocular vision, are able to drive well despite that disability, and have good driving records.

Kirkingburg informed Albertson's that he had applied for a waiver under the program, but Albertson's explained that it would not accept a waiver because it had a policy of employing only drivers who "meet or exceed the minimum DOT standards." Consequently, Albertson's fired Kirkingburg from his position as a truck driver. Several months later, when Kirkingburg informed Albertson's that he had in fact obtained a vision waiver, Albertson's once again refused to accept it and declined to reconsider his termination. Kirkingburg brought suit, alleging that Albertson's discriminated against him in violation of the ADA.

DISCUSSION

The Americans with Disabilities Act

When Congress enacted the Americans with Disabilities Act in 1990, it sought to eliminate the barriers that prevent disabled individuals from becoming fully participating members in all aspects of their communities, particularly in the area of employment. In furtherance of Congress's expansively stated goal of equality, the Act prohibits covered employers from engaging in employment practices that discriminate against individuals with disabilities. Specifically, the ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). The ADA contemplates that a person with a disability will be evaluated on the basis of his individual capabilities, not on the basis of society's biases or an employer's preconceptions.

[1] In this case, Kirkingburg claims that his employer violated the ADA by firing him because of his visual disability. In order to survive a motion for summary judgment, Kirkingburg must demonstrate a genuine issue of material fact regarding: (1) whether he is a disabled person within the meaning of the ADA; (2) whether he is otherwise qualified for the position, that is, whether he is able to perform the essential functions of the job, with or without reasonable accommodation; and (3) whether the employer terminated him because of his disability. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996).

Albertson's contends that Kirkingburg is not entitled to relief under the ADA because he is neither disabled nor an otherwise qualified individual. We examine whether Albertson's has established that it is entitled to summary judgment with respect to these two elements of Kirkingburg's ADA claim.[3]

1. Disabled

Albertson's first contends that Kirkingburg failed to raise a genuine issue of fact regarding whether he is disabled within the meaning of the ADA. We disagree with Albertson's argument that anything short of "legal blindness" in both eyes is insufficient to establish a disability under the ADA -- it is clear that a person who is blind or practically blind in one eye is disabled within the meaning of the Act.

[2] In determining what constitutes a disability under the ADA, we are guided by the definition of the term in the statute, which states that a "disability" is:

> (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

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3 There is no dispute regarding the third element of Kirkingburg's ADA claim; if he is disabled, he was terminated because of the disability.

42 U.S.C. § 12102(2). The implementing regulations further clarify the statutory definition of a disability. Under the regulations, an impairment is substantially limiting if it "significantly restricts as to the condition, *manner* or duration under which an individual can perform a particular major life activity as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(l)(ii) (1993) (emphasis added). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, *seeing*, hearing, speaking, breathing, learning, and working." *Id.* at § 1630.2(j) (emphasis added). In addition, the regulations enumerate the following factors that should be considered in determining whether an individual is substantially limited in a major life activity: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* at § 1630.(j)(2).

[3] Kirkingburg has presented uncontroverted evidence showing that he suffers from amblyopia, a condition resulting in his being almost totally blind in his left eye. In short, he has monocular vision. Given the nature of the condition and its permanence, there is no question that Kirkingburg is substantially limited in the major life activity of seeing. Kirkingburg's inability to see out of one eye affects his peripheral vision and his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see. To put it in its simplest terms, Kirkingburg sees using

only one eye; most people see using two. Accordingly, under the statute and implementing regulations, if the facts are as Kirkingburg alleges, he is disabled.

The Eighth Circuit recently decided an almost identical question. In *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998), that court held that a monocular-visioned person, who could see out of only one eye because of glaucoma, was "disabled." That the individual had learned to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects did not change his disabled status. *Id.* at 627-28. It was enough to warrant a finding of disability, the court held, that the plaintiff could see out of only one eye: the *manner* in which he performed the major life activity of seeing was different.[4] *Id.* at 627.

[4] Albertson's contention that Kirkingburg is not disabled because he is not totally blind is plainly inconsistent with the expansive goals of the ADA. The Act was drafted in

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4 Recently, the Fifth Circuit held as a matter of law that a monocular-visioned individual was not disabled because he was "able to perform normal daily activities." *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997). We think this reasoning is inconsistent not only with the regulations, but with the Act itself. Whether an individual is disabled within the meaning of the Act does not depend, contrary to the Fifth Circuit's suggestion, on whether the individual can go about his daily business in spite of the impairment. Instead, the appropriate inquiry in cases such as this is whether, as a result of a physical impairment, the individual is required to perform a major life activity in a different manner from other persons. Notably, the *Still* court did not cite or discuss 29 C.F.R. § 1630.2(j)(l)(ii) in reaching its decision. Accordingly, we agree with the Eighth Circuit's analysis and reject the Fifth Circuit's.

broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination -- it was not drafted narrowly to protect only those with the most severe disabilities. *See Arnold v. United Parcel Svc., Inc.*, 1998 WL 63505, at *7 (1st Cir., Feb. 20, 1998) ("Conceptually, it seems more consistent with Congress's broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination.").

[5] We also note that an expansive reading of the statutory definition of a "disability" does not leave employers unduly exposed to liability. The ADA does not require employers to hire or retain in service any person who is not capable of doing his job properly. It merely prohibits employers from discriminating against qualified workers on account of their disabilities. The Act contains several provisions that adequately protect the employer's interests. For example, an individual seeking the protection of the Act must demonstrate that he is "qualified" for the job in spite of his impairment. 42 U.S.C. §§ 12111(8), 12112(a). And, if accommodations are necessary to enable the employee to perform the essential functions of the job, an employer will only be required to make such accommodations if they are "reasonable," in light of the costs or other burdens they impose on the employer. *Id.* at § 12111(9), (10).

[6] As an alternative ground for our decision, we note that there exists a genuine issue of fact regarding whether Albertson's perceived Kirkingburg as disabled. Thus, even if Kirkingburg were not disabled, his employer's perception of him as having a disability would be sufficient to bring him under the coverage of the Act. 42 U.S.C. § 12102(2)(c).

Because Kirkingburg has presented evidence showing that one of Albertson's managers described him as "blind in one eye or legally blind," he has established a genuine issue as to whether his employer believed he was disabled.

2. Qualified

[7] Under the ADA, Kirkingburg must show not only that he suffers from a disability, but also that he is a "qualified individual." *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990). In this regard, Kirkingburg must establish (1) that he "satisfies the requisite skill, experience, education and other job-related requirements of the employment position [he] holds," and (2) that with or without reasonable accommodation, he can perform the essential functions of the position. 29 C.F.R. § 1630.2(m); *see also Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 807-09 (5th Cir. 1997) (elaborating on the proper inquiry). We address the two requirements, beginning with the latter.

a. Essential Functions

[8] Kirkingburg has, at the least, established a genuine issue of material fact with respect to whether he can perform the essential functions of a commercial truck driver. The regulations define the term "essential functions" to mean: "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n). There is no question that Kirkingburg's experience as a commercial truck driver, and in particular his year of experience as a truck driver for Albertson's, is evidence from which a reasonable factfinder could conclude that Kirkingburg is able to perform the essential functions of the job. More pertinent to the issues in this case, as we will discuss more fully below, is the fact that

Kirkingburg received a FHWA waiver based in part on his excellent driving record.

Albertson's maintains that an "essential function" of the job is Kirkingburg's ability to meet DOT safety regulations and that because he cannot meet the standards, he is unable to perform an essential function. We think this argument is more properly considered as a challenge to whether Kirkingburg has satisfied the job-related requirements. Accordingly, we turn to that issue.

b. Job-related Requirements

[9] In one sense, the question in this case is the traditional one -- whether Kirkingburg satisfies the first prong of the "otherwise qualified" test, that is, whether he can satisfy the pertinent job-related requirements. Ultimately, however, the dispositive question is actually whether Albertson's job-related requirement that Kirkingburg fails to meet is lawful as applied. Albertson's maintains that Kirkingburg cannot show that he is qualified because he cannot fulfill its requirement of meeting or exceeding the regular DOT vision standards. In this respect, Albertson's makes two separate arguments. First, it contends that federal law mandates that it require that its drivers meet the regular DOT vision standards.[5] Second, it asserts that, independent

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5 Albertson's invokes *Buck v. United States Dep't of Transp.*, 56 F.3d 1406 (D.C. Cir. 1995), for the proposition that it should not be compelled to employ a driver who cannot satisfy the regular federal safety standards. In *Buck*, three deaf truck drivers argued that under the Rehabilitation Act (after which the ADA is modeled), "it [was] unlawful for the agency to rely upon a general rule applicable to all hearing-impaired individuals without regard to their actual ability to drive a truck safely." *Id.* at 1408. The D.C. Circuit rejected the petitioners'

of its obligation to ensure compliance with federal law, it has the right to adopt the regular DOT vision standards as its own, and that its refusal to accept FHWA waivers is justified because drivers who do not meet the basic standards pose a direct safety threat. In turn, Kirkingburg challenges the legality of Albertson's requirements and its refusal to recognize his FHWA waiver.

(i) Compliance with Federal Law

[10] As to Albertson's first contention, we think the answer is obvious. Because the FHWA waiver program is part of federal law and recognizing FHWA waivers is perfectly consistent with federal law, Albertson's cannot justify its adoption of the regular DOT vision standards as a job-related requirement by asserting that federal law requires its drivers to meet those standards regardless of whether they are qualified for and obtain FHWA waivers. Albertson's has not simply conformed its job requirements to the relevant DOT regulations; rather, it has chosen to adhere to only a part of the regulations, while ignoring the waiver program.

[11] By refusing to accept FHWA waivers,

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argument, finding that the implementation of general safety standards by the FHWA and the agency's *refusal* to establish a waiver program is not violative of the Rehabilitation Act if insufficient evidence exists justifying such waivers. *Id.*

Buck is clearly inapposite to this case. Here, the FHWA *has* created a waiver program for vision-impaired drivers. The decision to implement the program was well supported by empirical evidence that a number of drivers who do not meet the otherwise applicable vision standards are nevertheless able to operate commercial vehicles safely. Moreover, the FHWA has determined that Kirkingburg is one of them.

Albertson's has rejected a portion of the federal scheme that was specifically designed to eliminate the discriminatory effects of the DOT safety regulations and bring those regulations into compliance with the ADA. *See Rauenhorst v. United States Dep't of Transp., Fed. Highway Admin.*, 95 F.3d 715, 716-17 (8th Cir. 1996). The waiver program was the result of Congress's expectation that DOT would review its regulations in light of the ADA's mandates and "make the necessary changes to its regulations in order to end unwarranted discrimination against the disabled." *Id.* at 717 (footnote omitted). Allowing Albertson's to prevail in this argument would deal a serious blow to the FHWA's efforts to establish regulations that conform to the requirements of the ADA, in particular the Act's mandate that disabled persons be evaluated in light of their individual abilities.

Apparently hoping to convince us that the waiver program is not a legitimate part of the federal regulatory scheme, Albertson's contends further that it should not be compelled to accept a DOT waiver because: (1) the waiver program is experimental, and (2) it has been invalidated by the D.C. Circuit. *See Advocates for Highway & Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994). Neither of these arguments is meritorious.

The waiver program, which was instituted in July 1992, has been adjudged a success by the FHWA. *See* 59 Fed. Reg. 59,389 (1994) (determining, after two years of study, "that the issuance of waivers to the 2,399 drivers remaining in the study group is consistent with the public interest and the safe operation of commercial motor vehicles"). The success of the program is no surprise, given that waiver recipients are selected on the basis of individual evaluations, under exacting standards. Only drivers who

have exemplary driving records are eligible. Contrary to what Albertson's would have us believe, there is no evidence whatsoever that drivers who have been certified to drive under the waiver program are less safe than drivers who have been certified under the ordinary standards. In fact, quite the opposite appears to be true. In an interim report, the FHWA concluded that "the driving performance of individuals participating in the vision waiver program is better than the driving performance of all commercial vehicle drivers collectively."[6] *FHWA Interim Monitoring Report on the Drivers of Commercial Motor Vehicles*, 3 (1994).

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6 In fact, the excellent safety records of the waiver program participants was cause for reevaluating the program's research methods with respect to its ultimate purpose: to alter the regular vision standards permanently. 59 Fed. Reg. 59386, 59388-90 (1994). To the extent that the program was a "failed experiment," as Albertson's alleges, it was not a failure in terms of the safety performance of those to whom waivers were granted. Its only "flaw" was that preselecting monocular drivers with extraordinary safety records resulted in what may have been unrepresentative and super-safe group of drivers.

Detractors of the program successfully argued to the agency that because only the safest drivers were granted waivers, the safety records of waiver recipients were not reliable indicators of the potential safety records of all monocular-visioned drivers. *Id.* at 59389. Thus, the detractors concluded, the success of the waiver program should not serve as a basis for modifying the regular vision standards so as to render *all* monocular persons qualified to drive commercial trucks. The FHWA agreed and concluded that it needed to adopt a new research method "to develop parameters for performance-based visual standards" that "reflect the actual physical requirements that foster [ ] safe operation of commercial vehicles." *Id.* at 59389-90. But the agency's decision to change its research methods is of no help to Albertson's in this case, because the decision was based on the highly *successful* track records of the carefully selected group of waiver recipients, including Kirkingburg.

Albertson's also contends that it was not required to accept the FHWA waiver because the D.C. Circuit invalidated the program in 1994. We do not think Albertson's can justify its termination of Kirkingburg and its refusal to accept the waiver on the basis of events that occurred long after its decisions.[7] *See O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759-61 (explaining that evidence of a justification not known to the employer at the time of discharge cannot serve to justify the termination). Additionally, there is nothing in the record before us that suggests that Albertson's decision in November 1992 not to accept the waiver was based on its belief that the program had been invalidly adopted. Instead, on the record before us, it is undisputed that when Albertson's terminated Kirkingburg and refused to accept the waiver, it was *not* because it believed that the program had been invalidly adopted. Rather, the record reflects that Albertson's refused to accept the waiver simply because it believed that it could continue to require its drivers to meet the regular DOT vision standards notwithstanding the lawful issuance of a waiver by the FHWA. In a letter to the Oregon Bureau of Labor & Industries, dated August 23, 1993, Albertson's stated: "Albertson's does not employ drivers who do not meet

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7 In some respects, this question is analogous to that presented in after-acquired evidence cases in which an employer subsequently discovers a lawful justification for its previously unlawful action. *See O'Day*, 79 F.3d at 758. The general rule in those cases is that the employer cannot use such justifications to support the discharge. However, while it is appropriate in those cases to permit the employer to use the evidence in order to limit the amount of damages it must pay, the after-acquired evidence in this case probably would not affect Kirkingburg's damage award, because the new justification does not involve employee wrongdoing and the FHWA revalidated the waiver program following the D.C. Circuit's decision.

minimum DOT requirements. The fact that Mr. Kirkingburg applied for and received a waiver of the DOT vision requirements, does not mean that he meets the minimum qualifications of a DOT driver."

[12] As we discussed above, Albertson's was not free to disregard the waiver program for the reasons it asserted at the time it fired Kirkingburg. Because there is no evidence in the record indicating that Albertson's believed the waiver program to be invalid when it terminated Kirkingburg or that it relied upon any such belief as a basis for its refusal to accept the FHWA waiver, we need not decide whether such a belief would shield it from liability, or whether it might instead have been required to challenge the validity of the waiver program in an administrative proceeding. We leave these questions to the district court should they become relevant on remand. We emphasize that because we are reviewing a summary judgment motion, we do not finally resolve any issues that may be dependent on the introduction of further admissible evidence at trial.

In any event, the D.C. Circuit invalidated the waiver program in 1994 not because it was inconsistent with public safety, but because the FHWA instituted the program without complying adequately with administrative procedures. *See Advocates*, 28 F.3d at 1294. When the case was remanded to the FHWA for further consideration after the court's decision, the agency conducted the appropriate notice and comment procedures and once again concluded that the waiver program was a desirable measure in light of both safety concerns and the goals of the ADA. No challenge has been made to that decision, and the statutory provision allowing the FHWA to grant waivers to vision-impaired drivers remains in effect. 49 U.S.C. § 31136(e)(1). In fact,

last year, the FHWA granted at least one waiver to a monocular-visioned driver. 62 Fed. Reg. 35,881 (1997). Thus, we reject Albertson's argument that the waiver program is not a lawful and legitimate part of the DOT regulatory scheme.[8]

(ii) Direct Safety Threat

Alternatively, Albertson's maintains that its independent adoption of the regular DOT vision standards without the waiver provision, as a job-related requirement, is consistent with the ADA. It asserts that requiring compliance with the regular DOT vision standards is necessary to prevent visually-impaired employees from "pos[ing] a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). In other words, it argues that recognizing the FHWA waivers would constitute a direct safety hazard.

The practical effect of Albertson's argument is to seek to have us declare the waiver program invalid. We seriously question our jurisdiction to do so in the context of these proceedings. We doubt that a business that operates in the highly regulated commercial transportation industry is free to challenge generally applicable FHWA regulations in private litigation. In particular, our concern is that allowing such a challenge would effectively permit a regulated entity to circumvent the specific scheme for judicial review of FHWA

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8 The dissent asserts that the waiver program is not part of the regulatory scheme. That is not correct. The statute governing the DOT safety standards specifically includes a provision allowing for waivers of the regular standards and we consider the "scheme" to include all the relevant rules, regulations, and statutory provisions.

regulations that Congress carefully established in the Administrative Orders Review Act (commonly known as the Hobbs Act).[9] 28 U.S.C. §§ 2321, 2342. Because the parties have not addressed this question, however, we will not decide it here, leaving it to the district court to do so initially, should further proceedings following remand make such a determination appropriate or necessary.

[13] In any event, Albertson's has simply failed to produce any evidence that Kirkingburg and other waiver recipients pose a direct safety threat. Under the statute, a direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* at § 12111(3). A "significant risk" means a high probability of harm that is neither remote nor speculative. 29 C.F.R. § 1630.2(j). Drivers who qualify for the waiver program have necessarily established to the satisfaction of the agency charged with ensuring highway safety that they do not pose a safety threat at all.[10] Denying a

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9 The Hobbs Act governs judicial review of rules, regulations, and final orders of a handful of agencies, including the Interstate Commerce Commission, under which authority the FHWA acts. For a discussion of the Hobbs Act and its purposes. see *Carpenter v. Department of Transportation*, 13 F.3d 313 (9th Cir. 1994). *Carpenter*, a pre-waiver program case, involved a driver with monocular vision who had been disqualified from driving when the FHWA found that he did not meet the applicable vision standards. The driver brought an action in federal district court, claiming that the regulations violated his civil rights. We dismissed the claim, finding that the Hobbs Act "requires that such a challenge be brought only in the court of appeals." *Id.* at 314.

10 It bears mentioning once again that, prior to offering Kirkingburg a job, Albertson's gave him a 16-mile road test. He performed well on the test and demonstrated to Albertson's transportation manager that he had "superior driving skill to operate safely the type of

monocular-visioned driver the opportunity to work, in spite of his having demonstrated that he is capable of performing the job safely, is precisely the sort of unwarranted discrimination that the ADA sought to abolish.

[14] To the extent that Albertson's contends that DOT vision requirements governing the qualifications of truck drivers constitute a floor, not a ceiling, and that it is free to adopt more restrictive standards than are set forth in the regulations, it misperceives the nature and purpose of the FHWA waiver program. The waiver program was designed to bring the DOT regulations into compliance with the requirements of the ADA and serves to protect disabled persons against unfounded discrimination. More important for our purposes, however, the individuals who secure waivers under the program have been determined to be safe drivers. It is evident, therefore, that however one views the other parts of the DOT regulations, the waiver program does not provide a floor for employers; rather it precludes them from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver are incapable of performing that job by virtue of their disability.[11]

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commercial vehicles listed above." In fact, the record as a whole demonstrates clearly, and without a hint of any contrary evidence (other than the fact of his monocular vision), that Kirkingburg is eminently qualified for the job of commercial truck driver.

11 Albertson's does not contend that it is entitled to adopt vision standards that are more stringent than those contained in the federal regulations, including the waiver program, because the work its drivers perform is substantially different from the work performed by other commercial truck driver. We express no view as to how such an argument would fare in a case in which it was properly presented.

Albertson's may, in other respects, be able to adhere to stricter standards than those contained in federal regulations. But when the stricter standards it adopts screen out people with disabilities in contravention of a federal program designed both to protect the public safety and ensure compliance with the ADA, it will not be able to avoid the Act's strictures by showing that its standards are necessary to prevent a direct safety threat. To put it another way, the FHWA has already determined that the regular DOT vision standards, if applied across the board, would unnecessarily discriminate against visually impaired drivers in violation of the ADA. It has also determined that some visually impaired drivers who cannot meet the regular standards are nevertheless safe, competent drivers. In light of the agency's determination that waiver recipients do not pose a threat to public safety, we conclude that Albertson's is precluded from asserting that they do.

CONCLUSION

In short, we conclude that if the facts are as Kirkingburg alleges, he suffers from a disability and is therefore protected by the provisions of the ADA. We further conclude that in establishing its job-related prerequisites, Albertson's cannot selectively adopt and reject federal safety regulations when the effect of its selective adoption and rejection is to discriminate against truck drivers with disabilities. Albertson's job requirement, which screens out otherwise qualified individuals with disabilities, is invalid.

Because Kirkingburg's failure to satisfy the discriminatory prerequisite served as the sole basis for the granting of summary judgment in favor of Albertson's, we reverse the district court's award and remand for further

proceedings.

REVERSED and REMANDED.

RYMER, Circuit Judge, dissenting:

The majority subjects Albertson's to liability under the ADA for requiring a commercial truck driver to comply with the visual acuity regulations of the Department of Transportation as an essential function of his job rather than letting him participate in an experimental program that waived those requirements but had not been found safe. I must dissent.

Complying with current DOT safety requirements was an essential function of Kirkingburg's job at Albertson's.[12] There is no dispute that his eyesight didn't meet them. He could not be certified. But several months before he lost his certification, the FHWA decided to select a group of experienced monocular drivers with clean safety records to be licensed for a three year study of the relationship between visual disorders and commercial motor vehicle safety. Kirkingburg says that he could have performed the essential functions of his job by virtue of a waiver, and that in any event, his disability should have been

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12 Kirkingburg contends that the essential function of his job was being certified by DOT, not being in compliance with its regulations. However, there is no evidence that Albertson's ever accepted a waiver or defined the essential function of driving its commercial vehicles as anything less than complying with DOT visual acuity standards.

accommodated by allowing him a leave of absence to get one.

The problem is that DOT vision regulations were adopted for public safety. The version in effect in November 1992, when Kirkingburg failed to get certified, had been on the books since 1970. Although numerous studies had been conducted to determine whether vision requirements for monocular drivers could safely be changed, the FHWA found no sufficient basis for doing so as recently as July 16, 1992.[13] *See* 57 Fed. Reg. 31458 (1992). That's why the FHWA decided to conduct a study to gather empirical data on monocular drivers, and to grant waivers on a limited basis to an experimental group. *See* id. Even so, the FHWA had not determined that the existing regulations could safely be waived albeit experimentally for monocular drivers. That is why the D.C. Circuit held that the waiver program itself was invalid; the agency had not made the required finding that a waiver was "consistent with the safe operation of commercial motor vehicles" as required by statute. *Advocates for Highway and Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288, 1289 (D.C. Cir. 1994).

Neither Kirkingburg nor the majority explains why the ADA should force Albertson's to assume the risk of waiving vision requirements that the FHWA itself had not found could be safely waived. Instead, the majority says that because the FHWA determined in *1994* that the vision study was safe enough to continue, Albertson's cannot say that in *1992* its requirement of complying with the vision regulations and rejecting a waiver was justified on account of safety. But

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13 *See Rauenhorst v. Department of Transp.*, 95 F.3d 715 (8th Cir. 1996) (outlining history).

the syllogism is flawed:

1. The majority starts with the premise that the dispositive question is "whether Albertson's job-related requirement that Kirkingburg fails to meet is lawful as applied." Whatever this means in the context of the ADA (where the real question is whether the employee is a "qualified individual with a disability who, with or without accommodation, can perform the essential functions of the employment position," 42 U.S.C. § 12111(8)), it cannot be the case that requiring compliance with DOT safety regulations is unlawful. Nor can it become unlawful "as applied" when the alternative is a waiver available only to an experimental group of drivers in a study that no one had found was consistent with the safe operation of commercial motor vehicles.

2. Next, the majority asserts that Albertson's has not "simply conformed its job requirements to the relevant DOT regulations; rather, it has chosen to adhere to only a part of the regulations, while ignoring the waiver program." However, Albertson's did not pick and choose regulations: the regulations hadn't changed in November of 1992 (and still haven't). It conformed its conduct precisely to the regulations in effect. The vision study waiver program was not part of the regulations, nor was it "a portion of the federal scheme" to prevent discrimination that Albertson's impermissibly rejected, as the majority suggests. Rather, the vision study waiver program was part of the FHWA's "efforts to review, and to eventually amend, its vision requirements through a rulemaking action." 57 Fed. Reg. 31458, 31458 (1992). As the agency explained,

> the waiver program will enable the FHWA to conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the current Federal vision requirements. This study will provide the empirical data necessary to evaluate the relationships between specific visual deficiencies and the operation of CMVs. The data will permit the FHWA to properly evaluate its current vision requirement in the context of actual driver performance, and, if necessary, establish a new vision requirement which is safe, fair, and rationally related to the latest medical knowledge and highway technology.

Id. In short, the vision waiver study was not a rule or a regulation with the force of law. It was a test, and an invalid test at that (as the D.C. Circuit held), for no determination had been made that waiving the vision requirements would not adversely affect the safe operation of commercial vehicles.

3. Next, the majority says that the waiver program "has been adjudged a success by the FHWA." Whether that's so or not, the determination referred to is the FHWA's "Notice of Final Determination and change in research plan" issued November 17, 1994 -- two years after Kirkingburg lost his job. 59 Fed. Reg. 59386, 59389 (1994). But it doesn't matter what the FHWA *now* thinks about the safety of its waiver study program. Whatever it had learned as a result of two years worth of the experiment wasn't known to Albertson's in November 1992, or to the agency at the time of the study was begun in July 1992. As Kirkingburg seeks damages for his November 1992

termination, not reinstatement, the 1994, post-*Advocates* determination is simply irrelevant.

4. Finally, having said that Albertson's adhered to only part of the regulations because it ignored the waiver program, and that the waiver program is a success, the majority concludes that the waiver program "is a lawful and legitimate part of the DOT regulatory scheme" which Albertson's cannot say was not safe. Thus it holds that Albertson's "cannot selectively adopt and reject federal safety regulations" in establishing its job-related prerequisites, and that its job requirement is invalid. But since the vision study waiver program never was (and still isn't) a part of the regulations: and since it wasn't a success at the time of Kirkingburg's termination because it hadn't gotten off the ground and wasn't determined to be safe; and since it never was (and still isn't) a part of any regulatory scheme, there is no basis for holding that Albertson's job requirement is invalid. Nor is there any authority for estopping Albertson's, which is a private employer with legal responsibility to the public for the safety of its commercial motor vehicle drivers, from asserting that it wasn't required to accept a waiver, or that it wasn't reasonable for it to decline to do so, on the grounds of safety. To me it is dispositive that at the time of Kirkingburg's termination (and in this record), no one (including the FHWA) had determined that a waiver was safe.

For these reasons, I agree with the district court that Kirkingburg failed to show that he could perform the essential functions of his job because he did not meet the DOT visual requirements, and that the ADA does not require Albertson's to accept an experimental waiver that the FHWA had not found consistent with the safe operation of

commercial motor vehicles. Since Albertson's offered to accommodate Kirkingburg's disability by another job (which Kirkingburg rejected), it fulfilled its ADA obligations. I would, therefore, affirm.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HALLIE KIRKINGBURG,	)	No. 96-35002
	)	
Plaintiff-Appellant,	)	D.C. No.95-549-PA
v.	)	
	)	ORDER
ALBERTSON'S, INC.,	)	Filed July 8, 1998
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, REINHARDT, and RYMER, Circuit Judges.

Judges Goodwin and Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Rymer voted to grant the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,	)	
	)	
Plaintiff,	)	CV 95-549-PA
v.	)	
	)	OPINION
	)	Filed Oct. 25, 1995
ALBERTSONS, INC., a Delaware corporation,	)	
	)	
Defendant.	)	

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PANNER, J.

Plaintiff Hallie Kirkingburg brings this action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, against his former employer, defendant Albertson's, Inc. Plaintiff, who worked as a truck driver, alleges that defendant illegally terminated him because he is almost blind in one eye.

Defendant moves for summary judgment. I grant the motion.

BACKGROUND

Since childhood plaintiff has had amblyopia in his left eye, "an impairment of vision without detectable organic lesion." Roth v. Lutheran General Hospital, 57 F.3d 1446, 1449 n.3 (7th Cir. 1995). The condition, which cannot be corrected, leaves plaintiff almost blind in his left eye.

Plaintiff became a commercial truck driver in 1979. Defendant hired him in August 1990. Plaintiff has had a clean driving record.

The United States Department of Transportation (DOT) regulations require that interstate commercial truck drivers have "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses . . . ." 49 C.F.R. § 391.41(b)(10). Plaintiff has never met this vision standard, but managed to obtain DOT certification anyway. One physician certified plaintiff "[b]ecause he had been

driving for many years with this type of vision without any apparent problems." Tom Affidavit, Exh. E, at 16 (Sayler Depo. at 10).

In 1991, plaintiff injured his head when he fell from a truck. When plaintiff was released to work in November 1992, defendant ordered him to undergo a medical examination. On November 6, 1992, Dr. Douglas reported that plaintiff did not meet DOT vision standards.

On November 20, 1992, defendant fired plaintiff. According to Frank Riddle, a manager for defendant, "[w]e felt it was a matter of safety. We were solely concerned about the safe operation of our vehicles." Plaintiff's Concise Statement at 84 (Riddle Depo. at 13).

Plaintiff applied for a "vision waiver" from the Federal Highway Administration (FHWA), which would give him DOT certification despite his amblyopia. The FHWA started the vision waiver program in 1992, partly because of the national policy "'to facilitate the employment of qualified individuals with disabilities.'" Advocates for Highway and Auto Safety v. Federal Highway Admin., 28 F.3d 1288, 1290 (D.C. Cir. 1994) (quoting 57 Fed. Reg. 31,458, 31,459 (1992)). Applicants needed a valid commercial license and three years' recent experience driving a commercial vehicle without moving violation citations, license suspensions, or driving-related convictions. Id. at 1290-91.

Plaintiff had the requisite clean driving record. He also had a letter from an optometrist, Beatrice Michel, stating that his vision had "not worsened since his last vision examination and is not expected to change in the future." Plaintiff's Concise Statement at 137. Dr. Michel concluded,

"As a licensed doctor of optometry, my opinion is that Mr. Kirkingburg can easily perform the driving tasks required. He has normal visual acuity (20/20) in the right eye, and the amblyopia in the left eye will not interfere with his ability to drive." Id. Plaintiff received a vision waiver in early 1993, but defendant refused to accept it.

In August 1994, the United States Court of Appeals for the District of Columbia Circuit struck down the vision waiver program, holding that the FHWA had not shown empirical evidence that the waivers were "'consistent with the safe operation of commercial motor vehicles.'" Advocates for Highway and Auto Safety, 28 F.3d at 1293 (quoting former 49 U.S.C. app. § 2505(f), now codified at 49 U.S.C. § 31136(e)). Because the waiver program was a "significant departure" from the FHWA's previous vision standards, the agency had a special burden to justify it. Id.

In November 1994, the FHWA determined that it would continue vision waivers for the approximately 3,000 drivers in the program, including plaintiff, until March 31, 1996. 59 Fed. Reg. 59,386, 59,387 (1994). The FHWA noted that the fatal accident rate for waived drivers was higher than for other drivers, but considered that unimportant because fatal accidents were rare and the waived drivers involved had not been found to be at fault by the reporting police officers. The agency conceded that information produced by the vision waiver program "will never answer the question as to what the standards should be," and concluded that "[t]he vision standard found at 49 CFR § 391.41(b) (10) will remain in effect until the completion of [future] research and the implementation of any new standard." Id. at 59,389-90.

STANDARDS

The court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex Corp v. Catrett, 477 U.S. 317, 322-23 (1986).

The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The court should resolve reasonable doubts about the existence of an issue of material fact against the moving party. Id. at 631. The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. Id. at 630-31.

DISCUSSION

The ADA prohibits covered employers from discriminating against qualified individuals with disabilities. 42 U.S.C. § 12112(a). To make a prima facie case under the ADA, plaintiff must show that (1) he is a disabled individual; (2) he is qualified, that is, he can perform the essential functions of the job with or without reasonable accommodation; and (3) defendant terminated him because of his disability. Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996 (D. Or. 1994); White v. York Int'l Corp., 45 F.2d 357, 360-61 (10th Cir. 1995); see also Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990) (elements of prima facie case under Rehabilitation Act).

Defendant contends that as a matter of law plaintiff was not a qualified individual. A "qualified individual with a disability" "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court should consider the employer's judgment on which job functions are essential. Id.

In deciding whether plaintiff was a qualified individual, the court must first "determine whether [plaintiff] could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue." Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, 114 S. Ct. 1386 (1994). If plaintiff cannot perform the essential functions of the job, the court must then determine "whether any reasonable accommodation by the employer would enable [plaintiff] to perform these functions." Id. at 1394.

Defendant argues that because plaintiff did not meet the DOT vision standards, he could not perform an essential function of his job. I agree with defendant that it properly considered meeting DOT minimum requirements essential to plaintiff's job.

Plaintiff argues that defendant should have reasonably accommodated him by granting him a leave of absence to obtain a vision waiver. However, the ADA does not obligate defendant to employ truck drivers who have received vision waivers. The vision waiver program is a flawed experiment that has not altered the DOT vision requirements.

No reasonable accommodation is possible. "An

employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Schmidt, 864 F. Supp. at 997; Buck v. United States Dep't of Transportation, 56 F.3d 1406, 1408 (D.C. Cir. 1995) (Rehabilitation Act did not require FHWA to perform individual assessments of truck drivers who failed DOT hearing requirements). If plaintiff were ever involved in an accident, defendant would have difficulty explaining why it hired a driver who could not meet DOT vision requirements. Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993) ("'Woe unto the employer who put such an employee behind the wheel'"; driver who failed DOT vision standards presented "genuine substantial risk that he could injure himself or others" (quoting Collier v. City of Dallas, No. 86-1010, 798 F.2d 1410, slip op. at 3 (5th Cir. Aug. 19, 1986) (unpublished)), cert. denied, 114 S. Ct. 1386 (1994).

Plaintiff argues that defendant's policy of rejecting all vision waivers violates the need for individual assessments under the ADA. See Sarsycki v. United Parcel Service, 862 F. Supp. 336, 341 (W.D. Okla. 1994) (ADA requires employer to make individualized assessment); 59 Fed. Reg. 50,887, 50,888 (1994) (FHWA stated that "a preferable standard [to the absolute 20/40 requirement] would allow drivers to demonstrate their individual ability to drive safely, in spite of their vision deficiency."). As plaintiff points out, his driving record is clean and an optometrist has attested that his vision is adequate. However, I conclude that defendant may rely on the DOT vision standards and need not make an individual assessment of plaintiff's ability to drive. See Buck, 56 F.3d at 1408-09 (DOT deafness standards) and Ward v. Skinner, 943 F.2d 157, 161-64 (1st Cir. 1991) (DOT

epilepsy standards), cert. denied, 503 U.S. 959 (1992).

CONCLUSION

Defendant's motion for summary judgment (#24) is granted .

DATED this 25th day of October, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,	)	
	)	
Plaintiff,	)	CV 95-549-PA
v.	)	
	)	ORDER
	)	Filed Nov. 9, 1995
ALBERTSONS, INC., a Delaware	)	
corporation,	)	
	)	
Defendant.	)	

PANNER, J.

Plaintiff Hallie Kirkingburg brings this action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, against his former employer, defendant Albertson's, Inc. Plaintiff alleges that he was a truck driver for defendant and that defendant terminated him because he has 20/200 vision in his left eye.

I granted defendant's motion for summary judgment. Plaintiff now moves for reconsideration, arguing that I should have determined whether reassigning plaintiff to a yard hostler position could have been a reasonable accommodation under the ADA. I deny the motion to reconsider.

Neither party cited controlling Ninth Circuit authority on whether an employer's duty to provide reasonable accommodation includes finding the disabled employee an alternative job. Cf. Buckingham v. United States, 998 F.2d

735, 740 (9th Cir. 1993) (under Rehabilitation Act, reasonable accommodation may include transfer to same position in different location). For this motion, I will assume that reassigning plaintiff to a vacant position is a possible reasonable accommodation. See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); but see Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) ("the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position"). However, plaintiff has not shown that the yard hostler position was vacant when he was terminated. Even if the yard hostler position was vacant, driving was an essential function of the job. "An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Schmidt v. Safeway, Inc., 864 F. Supp. 991, 997 (D. Or. 1994); see also Marschand v. Norfolk and Western Ry. Co., 876 F. Supp. 1528, 1543 (D. Ind. 1995) (employer not required to reassign disabled employee to vacant position unless employee is qualified for position).

CONCLUSION

Plaintiff's motion for reconsideration (#50) is denied.

IT IS SO ORDERED.

DATED this 9th day of November, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,	)	
	)	
Plaintiff,	)	CV 95-549-PA
v.	)	
	)	JUDGMENT OF
ALBERTSONS, INC., a Delaware	)	DISMISSAL
corporation,	)	Filed Dec. 15, 1995
Defendant.	)	

Judgment is for defendant. This action is dismissed.

DATED this 15th day of December, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge